



ASSOCIATION OF
AMERICAN RAILROADS

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March 4, 2010

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

ENTERED
Office of Proceedings

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Public Record

Re: Ex Parte No. 385 (Sub-No.7), Waybill Data Reporting for Toxic Inhalation Hazards

Dear Ms. Brown:

Pursuant to the Board's Notice of Proposed Rulemaking served January 28, 2010, attached please find the comments of the Association of American Railroads (AAR) for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot
Counsel for the Association of
American Railroads

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 385 (Sub-No. 7)

WAYBILL DATA REPORTING FOR TOXIC INHALATION HAZARDS

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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Dated: March 4, 2010

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Introduction

In a Notice of Proposed Rulemaking ("NPR") served January 28, 2010 in the above proceeding, the Surface Transportation Board requested comment on its proposal to amend its rules with respect to Waybill Sample information railroads are required to submit to the Board pursuant to 49 CFR 1244.¹ The Association of American Railroads ("AAR"), on behalf of its member railroads, hereby submits these comments in response to the NPR.

The AAR does not object to the proposed expansion of Toxic Inhalation Hazard ("TIH") traffic data available in a Three-Benchmark rate proceeding, subject to several security-related concerns. In particular, the AAR believes the Board must recognize that the expanded TIH information it seeks under the NPR is not only competitively sensitive data, but also *highly sensitive security information* ("SSI").

¹ A carload waybill is a document describing the characteristics of an individual rail shipment, and includes the following information: the originating and terminating freight stations, the railroads participating in the movement, the points of all railroad interchanges, the number of cars, the car initial and number, the movement weight, the commodity, and the freight revenue. See NPR at 2-3. Under 49 CFR 1244.2, a railroad is required to file Waybill Sample information for all line-haul revenue waybills terminated on its lines if: (a) it terminated at least 4,500 revenue carloads in any of the three preceding years; or (b) it terminated at least 5% of the revenue carloads terminating in any state in any of the three preceding years. The submitted information includes commercially sensitive data, and the Board's regulations establish procedures and limitations regarding release of Waybill Sample data. See 49 CFR 1244.9.

Accordingly, the AAR urges that the data should not be compiled or maintained on file at the Board because more secure means of achieving the Board's goals are available. Specifically, the data: (1) can readily be provided by the specific carrier that is party to a Three-Benchmark rate proceeding (in which only that carrier's TIH rates are at issue or relevant) pursuant to Board procedural requirements; and (2) is already being provided by the rail industry on a continuous basis to the Department of Homeland Security/Transportation Security Administration ("TSA") for security purposes and could be available to the Board for other STB regulatory purposes upon request under appropriate TSA confidentiality restrictions.² Accordingly, the AAR proposes that the Board modify its NPR proposal and obtain any additional TIH waybill data it needs by these alternative means when that need arises.

If the Board decides to collect the data itself, then at a minimum, the Board must adopt confidentiality rules specific to this TIH data. In particular, those rules should provide for treatment of the data in a manner that is consistent with the TSA and Department of Transportation ("DOT") rules regarding disclosure of this sensitive security information. The AAR further urges, among other confidentiality protections, that the 100% TIH data not be included as part of the Waybill Sample but instead be kept in a separate file subject to strict confidentiality protections; not be made available for studies by third parties without the approval of TSA; and not be included in the Public Use Waybill File (PUWF).

² TSA obtains the TIH waybill data pursuant to a contract with Railinc Corporation, a wholly-owned information technology subsidiary of the AAR. Railinc collects the TIH waybill data directly from individual rail carriers. Railinc also collects and prepares the Waybill Sample used by the STB and parties to STB regulatory proceedings under contract for the STB. The TIH waybill data provided under the Railinc contract is deemed sensitive security information ("SSI") by TSA and is subject to strict confidentiality requirements under TSA regulations. See 49 CFR 1520.1 et seq.

Background

The Board noted that, “[c]urrently, railroads that are required to file Waybill Sample information report a random sample of as little as 1% of carloads on a waybill. See 49 CFR 1244.4 (b)-(c). The proposed amendment...would expand the carload Waybill Sample information submitted to include all traffic movements designated as a TIH....” NPR at 1. The revised reporting under the proposed amendment would commence with the January 2011 Waybill Sample collection.

As noted in the NPR, the expanded information sought under the proposed rule is principally intended to assist the Board and parties in Three-Benchmark rail rate cases involving TIH materials:

“The Waybill Sample is the Board’s primary source of information about freight rail shipments terminating in the United States. The expanded information gathered from this proposed rule would permit the Board to assess more accurately TIH traffic within the United States, and specifically would be beneficial in Three-Benchmark rail rate cases involving TIH traffic. In those cases, the parties would have more data to draw upon when forming their comparison groups; therefore, the parties could construct comparison groups that would be more comparable to the issue traffic.”

NPR at 2.

Additionally, the Board anticipates that the expanded TIH information “would also assist the Board in quantifying the magnitude of TIH traffic, and would help the Board more accurately measure the associated costs of handling such traffic.” Id.

Other federal agencies also have an interest in TIH traffic data for security and public safety purposes. As previously noted, similar to the Waybill Sample information submitted by the rail industry to the Board pursuant to 49 CFR 1244.1 et seq., TSA has regulations governing the rail transportation of TIH materials and arrangements with the railroad industry for the railroads to provide waybill information for all TIH movements.

See *supra*, note 2; see also 49 CFR 1580.100; 1580.103. The TIH waybill data (including origins, destinations, commodities, car initial and number,³ and interchange locations) provided by the railroad industry to TSA is considered “sensitive security information” (“SSI”) by TSA and is subject to very specific confidentiality requirements that severely limit dissemination of such information. See 49 CFR 1580.1 et seq.⁴

Similarly, as a result of a Department of Transportation/ Pipeline and Hazardous Materials Safety Administration (“PHMSA”) rulemaking, railroads are required to compile commodity and routing information relating to TIH shipments for security and safety purposes.⁵ Under its rulemaking decision, PHMSA severely restricts access to TIH commodity data to “those with a ‘need-to-know’ for transportation and safety purposes, and further provided that such information may not be publicly disclosed pursuant to any state, local, or tribal law.” 73 Fed. Reg. 20759. PHMSA further considers that “it is not appropriate for [the compiled data] to be broadly disclosed to government or private entities.” *Id.*

The Federal Railroad Administration (“FRA”), in enacting rules to enforce the PHMSA rulemaking,⁶ noted that “it [would] comply with the existing SSI regulations [at 49 CFR parts 15 and 1520] with regard to the handling of the route analyses and *the*

³ Tank cars used to transport TIH materials are often dedicated cars used solely for a single TIH commodity; specific car identification data (like specific TIH commodity data) would accordingly constitute sensitive security-related waybill information pertaining to TIH traffic.

⁴ TSA regulations also generally define TIH materials transported by rail as “rail security sensitive materials” (49 CFR 1580.5, 1580.100(b)(2)).

⁵ Docket No. PHMSA-RSPA-2004-18730, Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments, 73 FR 20752-01 (April 16, 2008) (Interim Final Rule).

⁶ FRA-2007-28573, Railroad Safety Enforcement Procedures: Enforcement, Appeal and Hearing Procedures for Rail Routing Decisions, 73 FR 72194-01 (November 26, 2008) (Final Rule).

underlying commodity data.” 73 Fed. Reg. 72198. DOT requirements applicable to the protection of security sensitive information pertaining to TIH traffic are accordingly the same strict confidentiality requirements applied by TSA. See 49 CFR 15.1 et seq; 49 CFR 1520.1 et seq.

Discussion

A. The AAR Concurs That the Availability of Expanded TIH Waybill Data for Use in Three-Benchmark Rate Proceedings Would Be Useful

As recognized by the Board, the rate reasonableness analysis under the simplified Three-Benchmark rate guidelines adopted for use in its smallest rate proceedings relies in large part on the R/VC ratios of comparable traffic (“R/VC COMP”) as selected by the parties in their evidentiary submissions.⁷ Comparability, in turn, is determined in such proceedings by a variety of factors, such as length of movement, commodity type, transportation risks, traffic densities of the routes involved, and other factors.⁸

Because the current Waybill Sample is the primary source of comparable traffic data used in Three-Benchmark cases, and because the Waybill Sample currently includes a very limited number of a carrier’s TIH movements, the Board has found that the parties’ choice of comparable traffic groups is significantly limited.⁹ The AAR accordingly does not object to the expansion of the TIH traffic data available in a Three-

⁷ The R/VC COMP is used to compare the markup being paid by the challenged traffic to the average markup assessed on other comparable potentially captive traffic by the defendant carrier. Simplified Standards for Rail Rate Cases, STB Docket No. 646 (Sub-No. 1), at 16-18 (STB served Sept. 5, 2007), aff’d sub nom. CSX Transp., Inc. v. STB, 568 F.3d 236 (D.C. Cir. 2009), and vacated in part on reh’g, CSX Transp., Inc. v. STB, 584 F.3d 1076 (D.C. Cir. 2009).

⁸ See generally, Simplified Standards for Rail Rate Cases, STB Docket No. 646 (Sub-No. 1), at 82-84 (STB served Sept. 5, 2007), aff’d sub nom. CSX Transp., Inc. v. STB, 568 F.3d 236 (D.C. Cir. 2009), and vacated in part on reh’g, CSX Transp., Inc. v. STB, 584 F.3d 1076 (D.C. Cir. 2009).

⁹ Only approximately 2.5% of single-car TIH movements are included in the Waybill Sample under the current reporting criteria.

Benchmark rate proceeding to include all the defendant carrier's TIH traffic, subject to the security-related concerns discussed below.¹⁰

B. There Are Simpler and More Secure Alternatives That the Board Should Use to Obtain the Sensitive TIH Waybill Data It Needs for Three-Benchmark Rate Proceedings (and Other Regulatory Purposes) and the Board Should So Modify Its NPR Proposal

As the Board is aware from its proceedings focusing on the rail transportation of TIH materials,¹¹ a significant release of TIH materials in a densely populated area has the potential to cause catastrophic damage to persons and property. For such reasons TSA (and the Department of Transportation) view rail transportation of TIH a potential target for terrorist activity¹² and consider detailed information pertaining to rail TIH traffic (such as detailed waybill data, including origins, destinations, and interchange locations) sensitive security information that must be protected from unnecessary disclosure. See note 2, *supra*; see 49 CFR 1520.1 et seq.

The restrictions on disclosure of SSI adopted by TSA are stringent. The restrictions include: requiring each "covered person" that has access to SSI to store the information in a secure place such as a locked filing cabinet or room; restricting disclosure of the data only to "covered persons" that have "a need to know" the

¹⁰ Notwithstanding their willingness to make all TIH traffic available in a Three-Benchmark proceeding challenging a rate for a TIH commodity, the AAR members reserve all rights to argue in individual complaint proceedings, including related judicial review proceedings, that only shipments of the same TIH commodity are suitable for inclusion in a comparable group.

¹¹ STB Ex Parte No. 677 (Sub-No.1), Common Carrier Obligation of Railroads—Transportation of Hazardous Materials (served June 4, 2008); STB Ex Parte No. 681, Class I Railroad Accounting and Financial Reporting—Transportation of Hazardous Materials (served January 5, 2009).

¹² See DOT's April 16, 2008 discussion in its final interim rule pertaining to safety and security for hazardous materials shipments. Docket No. PHMSA-RSPA-2004-18730, Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments, 73 FR 20752 (April 16, 2008) ("The same characteristics of hazardous materials that cause concern in the event of an accidental release also make them attractive targets for terrorism or sabotage.")

information to perform transportation security activities or to perform official government duties¹³ unless authorized in writing by TSA, the Coast Guard or the Secretary of DOT; requiring referral of requests by third parties for access to SSI data to TSA or the applicable agency within DOT or DHS for approval; requiring that the data have a protective SSI marking ; and requiring that the SSI data must be destroyed when no longer needed. See 49 CFR 1520.9; 1520.19.

The AAR submits that, in light of the sensitive nature of detailed TIH waybill data, the Board should not collect and maintain this data (and subject it to potential inadvertent disclosure) unnecessarily. Instead, the AAR urges that the Board modify its NPR proposal and adopt the AAR's alternative proposals for obtaining the data as described below.¹⁴

First, with specific reference to use in Three-Benchmark rate proceedings (the Board's principal concern), the AAR urges that the Board pursue the alternative of simply requiring the defendant carrier in a Three-Benchmark rate proceeding to make available for use by the parties all of its TIH waybills for the most current period for the purpose of selecting "comparable traffic groups." Under existing Waybill Sample processing procedures, the waybill data would then be sent to Railinc Corp. for edit-

¹³ The terms "covered persons" and "persons with a need to know" are specifically defined in the regulations. The term "covered persons" includes DHS and DOT and railroad carriers. See 49 CFR 1520.7 (h) and (n), 49 CFR 1520.11.

¹⁴ Under the AAR's alternative proposals, the Board would continue to collect the Waybill Sample under its current sampling procedures, including with respect to the 2.5% sampling of TIH data. The Waybill Sample is used by the Board for a multitude of regulatory purposes, and such general use would continue unmodified under the AAR's proposal. The AAR would propose, however, that the additional TIH traffic disclosure restrictions proposed by the AAR also be applied to any TIH traffic included in the current Waybill Sample as discussed *infra* at 12-13.

checking and ALK Technologies, Inc. for “miling.”¹⁵ The uncosted TIH waybills would then be sent to the Board for costing using the most recently available URCS unit costs. The AAR anticipates that the entire waybill processing procedure could be accomplished in a period of approximately two to three weeks based on an efficient application of current procedures and would not unduly delay Three-Benchmark rate proceedings.

The AAR’s approach balances the Board’s need for such data for Three-Benchmark rate cases with the serious security concerns, raised by TSA and DOT in their rulemakings, presented by such data. Under the AAR’s proposal, the Board and parties would have access to a “100% TIH Waybill Sample” where needed on a case-by-case and specific-carrier basis in the context of a Three-Benchmark rate proceeding. The only outside parties to view the waybill data (pursuant to the Board’s special protective order procedures governing access to waybill data for use in Three-Benchmark proceedings) would be outside counsel for the shipper complainant (and expert consultants assisting outside counsel) who have “a need to know” the information for litigation purposes. After use by the complainant for its rate case under Board protective order, the TIH waybill data in the hands of the parties would be destroyed. None of the data would be made available to third parties for studies nor would it be included in the Waybill Sample or Public Use Waybill File (“PUWF”) (further avoiding the potential for inadvertent disclosure of confidential, security sensitive data).¹⁶

¹⁵ ALK Technologies, Inc. is a privately held information technology company headquartered in Princeton, NJ specializing in transportation consulting services. ALK’s services are currently employed (and have historically been employed) in preparing the Waybill Sample for the Board’s use. ALK’s rail network model uses waybill origin and destination points, carrier information and junction points to determine miles for the most likely TIH shipment route (which mileage calculation is necessary for costing the Waybill Sample).

¹⁶ Under the Board’s existing special protective order provisions applicable to access to waybill data for use in Three-Benchmark rate cases, the Board expressly recognizes that the data contains “commercially

Second, with respect to the Board's proposed use of the TIH waybill data for general purposes other than Three-Benchmark rate proceedings, the AAR submits that the Board would also have access to the TIH waybill data it needs through request to its sister agency, TSA. As noted *supra*, TSA, through its contract with Railinc, has continuous access to the TIH waybill data for security purposes and there should be no reason why TSA would not be able to make this data available to the Board for its own regulatory purposes pursuant to TSA disclosure restrictions. See 49 CFR 1520.9.

In short, there is no need for the Board to duplicate TSA's data collection efforts with respect to TIH waybill data or to do so under weaker protections against disclosure of this sensitive security information.

C. Should the Board Adopt Its NPR Proposal to Separately Collect the TIH Data, the Board Must Adopt Strict Confidentiality Measures Restricting Access to the Data and Should Keep the Data in a Separate File.

Should the Board nevertheless seek to separately collect the TIH waybill data for itself as proposed in the NPR, the AAR urges, among other confidentiality protections, that the Board adopt confidentiality rules consistent with TSA rules specific to this data; that the 100% TIH traffic data not be included as part of the Waybill Sample but instead be kept in a separate file subject to strict confidentiality protections; that the data not be made available for studies by third parties without the approval of TSA; and that the data not be included in the Public Use Waybill File.

sensitive" shipper and railroad data and limits disclosure as follows: only outside counsel and expert consultants may have access to the data for litigation purposes on a "need to know" basis; use of the data is solely for purpose of the litigation; the data cannot be disclosed to regular employees of the party being assisted in the litigation; the data may be kept only so long as it is necessary for the litigation (including judicial appeal); the data must be destroyed after completion of litigation (except that outside counsel are permitted to retain file copies of pleadings and evidence submitted to the Board and work product); and the data may be used for evidentiary submissions or judicial review purposes only in a pre-approved manner consistent with the protective order. The AAR believes that the Board's special protective order procedures used in Three-Benchmark proceedings are also sufficient to address any security concerns raised by use of TIH waybill data in such proceedings.

The TIH waybill data must be viewed in the context of the national security and public safety concerns, which the Board's fellow agencies have recognized, that arise from making available a detailed record of all recent TIH rail movements, including (1) specific TIH commodity, (2) involved carrier or carriers, (3) car initial and number (3) origin and destination freight stations, and (4) points of railroad interchanges. This is specific TIH routing-related information that must be kept on a "need to know" basis consistent with TSA confidentiality restrictions.

If the Board is not inclined to obtain the expanded TIH data through the railroad parties to Three-Benchmark rate proceedings or to work through TSA as the AAR urges, then at a minimum, the Board must adopt rules specific to this data that provide at least the same level of security protection as that provided by TSA's rules regarding the disclosure of sensitive security information. For example, under the Board's current procedures, the Waybill Sample data may be made available by the Board to third parties for "special studies" or other purposes. See 49 CFR 1244.9 (c). That provision is in conflict with TSA's restrictions on similar data, which limit access to the data on "a need to know" basis. See 49 CFR 1520.9, 1520.11. Similarly, the Board's confidentiality rules do not require referral to TSA (or DOT) for authorization for release of the data to third parties. Compare 49 CFR 1520.9 (a) (2). Simply put, the government should have a uniform approach for the treatment of this data so that the railroads are not put in jeopardy with one agency because they provided similar data to a second agency that has less stringent security regulations. Moreover, the data itself should be consistently protected by the handling agency.

The AAR offers two possible solutions to harmonize the Board's needs with the security concerns highlighted by its fellow agencies. One solution would be for the Board to adopt special disclosure restrictions related to security sensitive information such as this TIH data. Those rules could be patterned after the TSA rules.

Another solution would be for the Board to treat the TIH data similarly to the way the Board treats waybill data pertaining to "Munitions." Under the Board's current rules, adopted at the request of the Department of Defense ("DOD"), munitions data in the Waybill Sample are strictly protected based on DOD's concern that "release of detailed data of this type could pose a threat to national security and to public safety in general." See Procedures on Release of Data from the ICC Waybill Sample (49 CFR Part 1244), 4 I.C.C. 2d 194, 209-210 (1987). Under the Board's confidentiality procedures, Waybill Sample data pertaining to rail munitions traffic is only released by the Board under the broad category of "Ordinances or Accessories" (STCC 19) and no further breakdown of the broad 2-digit STCC 19 category is provided. Specific DOD consent is required in response to a request for more detailed waybill data pertaining to munitions. Id.; see 49 CFR 1244.9 (h).

To apply whatever heightened security measures the Board adopts for the TIH data without affecting the availability of other Waybill Sample information, the AAR urges that the STB collect the 100% TIH waybill data in a separate file. Keeping the 100% TIH waybill data in a separate file would also facilitate the application of the stricter confidentiality procedures adopted because the data would be segregated from the Waybill Sample itself.

The AAR further urges that the 100% TIH traffic data *not* be included or considered in any manner as part of the Waybill Sample itself. The TIH waybill data to be collected pursuant to the NPR includes *all* TIH traffic; it would not be a sample of TIH traffic comparable to the traffic samples collected for all other commodities in the Waybill Sample. Indeed, including 100% of TIH traffic with samples of all other shipments in the Waybill Sample could introduce distortions that would undermine other Waybill Sample calculations (e.g., calculation of the Revenue Shortfall Allocation Method (“RSAM”)¹⁷ and average $R/VC > 180$ ¹⁸ for use in Three-Benchmark rate proceedings).

Finally, the 100% TIH waybill data should not be included in the PUWF. The TIH data collected would not itself be a “waybill sample” and because of its sensitive nature, none of the data should be made publicly available whether in “public use” form or otherwise. Indeed, the PUWF currently provides commodity identification at the 5-digit STCC level which would be sufficient to specifically identify, for example, all chlorine (STCC # 28128) and anhydrous ammonia (STCC # 2819815) movements because no other commodity falls within the respective 5-digit STCC categories. If this commodity information were connected to otherwise publicly available origin, destination or interchange information, through the general PUWF geographic identifiers

¹⁷ The RSAM is the first benchmark figure used in a Three-Benchmark rate proceeding. The RSAM measures the average markup over variable cost that the defendant railroad would need to charge all of its potentially captive traffic (traffic priced above the 180% R/VC level) in order for the railroad to earn adequate revenues as measured by the Board under 49 U.S.C. 10704 (a) (2).

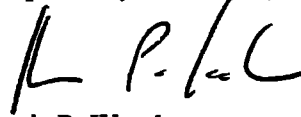
¹⁸ $R/VC > 180\%$ is the second benchmark figure used in a Three-Benchmark rate proceeding and measures the average markup over variable cost currently earned by the defendant railroad on its potentially captive traffic.

or otherwise, the confidentiality of the TIH waybill data would be unnecessarily compromised.¹⁹

Conclusion

The AAR does not object to making available 100% of railroad waybill records for TIH traffic as proposed by the Board. However, the AAR is concerned that additional safeguards are needed so that this information, which has been deemed sensitive security information by other agencies, is adequately protected. Accordingly, AAR urges that the Board modify its NPR proposal and obtain the expanded TIH waybill data by the simplest and most secure means possible and in a way that harmonizes with the regulations issued by other agencies to protect against dissemination of similar information.

Respectfully Submitted,



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¹⁹ The AAR would also propose that for purposes of general consistency with DOT and TSA STCC coding of hazardous materials and for more clarity in use in Three-Benchmark rate proceedings, the Board require identification of TIH commodities using the STCC # 49 and STCC # 48 hazardous materials categories used by DOT and TSA. For example the applicable STCC Codes for chlorine would be #4920523, 4920538 and for anhydrous ammonia would be # 4904210 (in lieu of their STCC #28 identifications supra).